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No. 144

# In the Supreme Court of the United States

OCTOBER TERM, 1958

FORD MOTOR COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-5a) is reported at 156 F. Supp. 554.

### JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1957. (Pet. App. 4a-5a; R. 77-78.) A timely petition for rehearing was denied on April 2, 1958. (Pet. App. 7a.) The petition for a writ of certiorari was filed June 30, 1958. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1255.

## QUESTION PRESENTED

Whether taxpayer, an automobile manufacturer which incurred costs in fulfilling an express warranty of its products against defects, is entitled, under provisions of the Internal Revenue Code, to a refund, *pro tanto*, of the manufacturer's excise tax paid upon the sale of such products.

## STATUTES AND REGULATIONS INVOLVED

Sections 3403, 3441(a), 3443(a)(2) and (b) of the Internal Revenue Code of 1939, Section 6416(b)(1) of the Internal Revenue Code of 1954, and Sections 316.12, 316.13, and 316.14 of Treasury Regulations 46 are set forth in pertinent part in Appendix A, *infra*, pp. 11-15.

## STATEMENT

This action involves claims for refund of manufacturer's excise taxes. Taxpayer is a manufacturer of passenger automobiles and trucks, and parts and accessories therefor, and sells its products to authorized dealers who in turn resell them to retail purchasers. (R. 1-2) By written instruments delivered to its authorized dealers, taxpayer expressly warranted the material and workmanship of the products against defects manifesting themselves prior to either (1) the time such products had been driven, used or operated for a distance of 4,000 miles or (2) 90 days from the time of delivery of such product to the original retail purchaser thereof (whichever event first occurred). The dealers delivered similar written warranties to the original retail purchasers. It was also taxpayer's policy, under certain conditions, to repair or replace (or bear the cost of repairing or replacing) products even after expiration of the period described in the

express warranty. No extra charge was made for the warranty, or for costs that might be incurred under taxpayer's repair and replacement policy. (R. 2.)

Between August 1, 1949, and December 31, 1954, taxpayer incurred certain costs in fulfilling warranties of its products and in carrying out its repair and replacement policy.[1]

It thereafter filed claims for refund of that portion of the manufacturer's excise taxes paid which corresponded to the proportion which the costs incurred by it bore to the original sale price. These claims for refund totaled $8,899,547.53. No action having been taken on such claims by the Commissioner, taxpayer instituted suit for refund in the Court of Claims under 28 U. S. C., Section 1491, asserting that the costs incurred by it constituted a readjustment of the sale price of its products by means of a "rebate" or "allowance" within the meaning of Section 3443(a)(2) of the Internal Revenue Code of 1939 and Section 6416(b)(1) of the Internal Revenue Code of 1954. (R. 1-5.)

After filing its answer (R. 7-9), the Government filed a motion for judgment on the pleadings (R. 15). The motion was granted by a unanimous court, and taxpayer's petition was dismissed. The Court of Claims held that the costs incurred by taxpayer in discharging its obligation under its warranty constituted an expenditure to remedy a defect, not a readjustment of the sale price; that the sale price of taxpayer's products was for an article free from defects; and that the sums expended by taxpayer in order to correct defects which later appeared were spent merely in fulfillment

[1] The repairs were made by taxpayer's authorized dealers who were, in turn, reimbursed by taxpayer. (Pet. App. 4a.)

of taxpayer's obligation to deliver an article free from defects. (Pet. App. 4a-5a; R. 77-78.)

ARGUMENT

The issue presented by the decision below has received consideration only by the Court of Claims, and no conflict with a decision of any other court is or can be asserted. In the present case, as in *General Motors Corp., Frigidaire Div.* v. *United States*, 147 F. Supp. 739, the Court of Claims has held that the cost of fulfilling the customary manufacturer's warranty does not constitute a readjustment of the sale price by a "rebate" or "allowance". Prior decisions of the Court of Claims which taxpayer contends are inconsistent with the decision below involved a different issue which is not presented by this case.

1. Under Section 3403 of the Internal Revenue Code of 1939 (Appendix A, *infra*, pp. 11-12)[2] an excise tax is imposed upon the sale by manufacturers of automobiles, trucks, and parts and accessories therefor. This tax, so far as here pertinent, is measured by the sale price as that term is defined in Section 3441(a) (Appendix A, *infra*, p. 12). Section 3443(a)(2) (Appendix A, *infra*, pp. 12-13) permits a credit or refund of excise tax paid if the "price" of a taxable article is "readjusted * * * by a bona fide discount, rebate, or allowance." The amount of the tax which may be refunded or credited is that amount which is proportionate to the part of the price which is "refunded or credited" to the purchaser. It is taxpayer's position that the costs

[2] The corresponding provisions of the Internal Revenue Code of 1954 are substantially the same, and are set forth in Appendix A *infra*, p. 13.

incurred by it in remedying defects in its products constitute readjustments of the sale price by means of a "rebate or allowance." This position, as the Court of Claims has twice held, is without merit.

What is involved here is nothing more than the customary manufacturer's warranty on automotive products. Under this warranty taxpayer had an obligation to repair or correct any defects in the products sold by it which became manifest during the period specified in the warranty. In making expenditures to remedy defects, taxpayer was not making any readjustment of the sale price but was merely fulfilling its own contractual duty and adding to the cost of the products sold. As the Court of Claims stated in *General Motors Corp., Frigidaire Div.* v. *United States*, *supra*, p. 742:

> The sales price was for an article free of defects. The cost of remedying defects that later appeared, therefore, cannot be an "allowance" to the purchaser to be deducted from the sales price. It was not an "allowance", but a sum spent to give to the purchaser what the manufacturer had represented it was selling him, to wit, a sound article.

In the decision below, the Court of Claims adhered to the same view.

The correctness of this conclusion is demonstrated by the language of the House Committee Report on the Revenue Act of 1932, in which the statutory provision in question first appeared. In that Report, it is stated. (H. Rep. No. 708, 72d Cong., 1st Sess., p. 39 (C.B. 1939-1 Cum. Bull. (Part 2) 457, 485)):

> This last provision [allowing the credit or refund] covers readjustments such as cash or

quantity discounts; credit for return of goods or containers, and any other bona fide rebate or allowance *amounting to a change in the sales price*. [Italics added.]

Clearly an expenditure made in correcting defects under a manufacturer's warranty is not a change in the sale price, but is a cost arising from the contractual obligation assumed by the manufacturer as a part of the sale.[3]

The language of the statute itself supports the conclusion that such expenditures by a manufacturer are not a readjustment of the sale price. Section 3443(a)(2) refers in terms to a refund or credit of that part of the tax which is "proportionate to the part of the price which is refunded or credited." It is manifest that in making repairs to a warranted article (or in reimbursing its purchaser for the cost of such repairs) the manufacturer has not "refunded or credited" to the purchaser any part of the sale price, but has merely placed the article in the condition in which it was warranted to be at the time of its delivery.

Essentially, taxpayer ignores the basic distinction between its contractual obligation to remove defects in the article sold and a credit or repayment of part of the sale price. The warranty here involved is in effect an agreement to repair the warranted article

[3] The applicable Regulations express the same view. Section 316.14 of Regulations 46 (Appendix A, *infra*, p. 151) provides that if an article is returned to the manufacturer under a guaranty of quality or service, a refund of tax may be made in proportion to the amount refunded to the vendee. These Regulations do not provide for any refund of tax where an article is repaired by the manufacturer and retained by the vendee.

or to reimburse the purchaser for the cost of making such repairs, if the article becomes defective within the warranty period. The sale price is fixed at the time of the original sale; it is the price established for an article wholly free from defects. If nevertheless, defects become apparent within the warranty period, the manufacturer must incur additional costs to insure that the article sold is in fact sound as originally warranted.[1]

2. Taxpayer refers to four allegedly inconsistent decisions of the Court of Claims as illustrating the need for a clarifying decision by this Court. These decisions are *General Motors Corp., Frigidaire Div.* v. *United States*, 121 F. Supp. 932, certiorari denied, 348 U.S. 942; *General Motors Corp., Frigidaire Div.* v. *United States*, 146 F. Supp. 220; *General Motors Corp., Frigidaire Div.* v. *United States*, *supra*, and the decision below. Upon examination of these decisions, it is apparent that there is no inconsistency relevant to the present controversy.

In the first two *Frigidaire* cases, the question presented to the Court of Claims involved not the usual manufacturer's warranty, but a separate charge made by the manufacturer for an additional warranty for an extended period. In those cases the manufacturer

[1] As the court below properly noted, it is immaterial that defects may have appeared after taxpayer's dealers had resold the products. Under the resale contracts, the dealers were obligated to repair any defects within the same warranty period, and taxpayer under its warranty was in turn obligated to reimburse the dealers for any costs incurred. The dealer who made the repair and was then reimbursed by taxpayer neither lost nor gained anything on account of correcting the defects. Consequently, the dealer received no rebate or allowance. (Pet. App. 5a.)

sold refrigerators (also subject to excise tax) with the customary one year manufacturer's warranty. In addition, however, the manufacturer made a separate charge of $5 for a warranty on the sealed refrigerating mechanisms for an additional period of four years. In both cases, the Court of Claims held that the separate $5 charge for the additional warranty period constituted an "allowance" under Section 3443(a)(2) of the 1939 Code.

In the third *Frigidaire* case, the same issue was again presented with respect to sales made in later years. On this occasion, the Court of Claims concluded that it had been in error in previously holding that the separate $5 charge for the extended warranty constituted an "allowance". It held, however, that this charge constituted an exclusion from the sale price under Section 3441(a) of the 1939 Code, such exclusion to be limited, however, to an amount reasonably related to the cost of making repairs during the extended warranty period.

In the third *Frigidaire* case, the manufacturer also claimed, for the first time, a refund based upon the customary manufacturer's warranty of one year. On that issue the court held as it does here that the cost of fulfilling the customary warranty does not constitute an allowance and that the manufacturer is not entitled to any credit or refund based upon such cost.

After its opinion of January 16, 1957, in the third *Frigidaire* case, the Court of Claims ordered evidence to be taken, covering, *inter alia*, the question of whether the five year warranty was customary in the trade during the years involved. Upon the evidence thus taken, the court made a finding of fact that the five year

warranty in question was customary in the trade, and on July 16, 1958 (subsequent to the filing of the petition for certiorari in the present case), it wrote an opinion holding that the price paid for these warranties was a taxable part of the purchase price of the article sold and that the taxpayer's petition should be dismissed. *General Motors Corp., Frigidaire Division,* v. *United States* (C. Cls. No. 55-56), decided July 16, 1958, not yet officially reported, reprinted in Appendix B, *infra*, pp. 16-23.

The position of the Court of Claims, as reflected in its various opinions, may be summed up as follows. Expenditures by a manufacturer to fulfill ordinary or customary warranties do not constitute a readjustment of sale price, for such expenses, when they are incurred, represent the cost of giving the purchaser what he contracted to buy—a sound article. However, a particular arrangement warranting an article for an extended period may, on particular facts, justify an exclusion from the purchase price, for what is in form a warranty of fitness may be in substance an agreement to give special service or maintenance. As to the first proposition (that involving ordinary warranties), the Court of Claims has been consistent from the beginning. The court has not been consistent, to be sure, in determining the category into which the warranty of the Frigidaire mechanism was to be fitted (which may be explained in large measure by the circumstance that the facts were fully developed only in the last phase of the case). In any event, even if lack of harmony in decisions of the Court of Claims constituted an adequate basis for invoking this Court's certiorari jurisdiction (but see *Wisniewski* v. *United States*, 353 U.S. 901, 902), there would remain for petitioner the obstacle that the only

lack of consistency has been in the disposition of a case involving a factual situation quite distinct from that presented here.

## CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1958.

## APPENDIX A

Internal Revenue Code of 1939:

SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) [as amended by Sec. 544(a), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 481(a), Revenue Act of 1951, c. 521, 65 Stat. 452] Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 8 per centum,[1] * * *

(b) [as amended by Sec. 544(a), Revenue Act of 1941, *supra*, and Sec. 481(b), Revenue Act of 1951, *supra*] *Other Chassis and Bodies, Etc.*—Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum,[2] * * *

(c) [as amended by Sec. 544(b), Revenue Act of 1941, *supra*, Sec. 605(c)(1), Revenue Act of 1950,

[1] Prior to the enactment of the Revenue Act of 1951, *supra*, the rate was 5 percent.

[2] Prior to the enactment of the Revenue Act of 1951, *supra*, the rate was 7 percent.

c. 994, 64 Stat. 906, and Sec. 481(c), Revenue Act of 1951, *supra*.] Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum,[3] * * *

(26 U. S. C. 1952 ed., Sec. 3403)

SEC. 3441. SALE PRICE.

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

* * *

(26 U. S. C. 1952 ed., Sec. 3441)

SEC. 3443. CREDITS AND REFUNDS.

(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * * * *

(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason

[3] Prior to the enactment of the Revenue Act of 1951, *supra*, the rate was 5 percent.

of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

* * * * * *

(b) Credit or refund under subsection (a) shall be allowed or made only upon compliance with regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 3443.)

Internal Revenue Code of 1954:

SEC. 6416. CERTAIN TAXES ON SALES AND SERVICES.

* * * * * *

(b) *Special Cases in Which Tax Payments Considered Overpayments.*—

Under regulations prescribed by the Secretary or his delegate credit or refund, without interest, shall be made of the overpayments determined under the following paragraphs:

(1) *Price readjustments.*—

If the price of any article in respect of which a tax, based on such price, is imposed by chapter 31 or 32, is readjusted by reason of the return or repossession of the article or a covering or container, or by a bona fide discount, rebate or allowance, the part of the tax proportionate to the part of the price repaid or credited to the purchaser shall be deemed to be an overpayment.

* * * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 6416.)

Treasury Regulations 46 (1940 ed):

SEC. 316.12. *Exclusion of charges for transportation, delivery etc., generally.*—Charges for transportation, delivery, insurance, installation, and other charges actually incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale, are to be excluded in computing the tax.

No other additional charge may be excluded in computing the tax unless it can be shown by adequate records to the satisfaction of the Commissioner that such charge properly is not to be included as a manufacturing or selling expense, or is in no way incidental to placing the article in condition packed ready for shipment.

SEC. 316.13. *Discounts and adjustments, generally.*—Readjustments in sale price (such as allowable discounts, rebates, bonuses, etc.) can not be anticipated. The tax must be based upon the original price unless the readjustments have actually been made prior to the close of the month in which the tax upon the sale is returned. However, if the price upon which the tax was computed is subsequently readjusted, a proper credit may be taken against the tax due on a subsequent return, or an appropriate claim for refund may be filed.

Commissions to agents, or allowances, payments, or adjustments made to persons other than the manufacturer's vendee are not deductible from the sale price under any conditions for purposes of computing the tax.

SEC. 316.14. *Exchanges, etc.*—Where articles sold are returned to the manufacturer by his vendee and the original sale is entirely rescinded by refunding the entire amount paid, including tax, to the vendee, no tax is payable on the transaction and, if paid, the tax may be credited or refunded. Where taxable articles sold are returned to the manufacturer by his vendee and only a part of the original sale price is refunded or credited to his vendee, the manufacturer is entitled to a tax credit computed on the portion of the sale price he refunds or credits to his vendee.

If an article is sold under a guaranty as to its quality or service and is thereafter returned and a rebate made pursuant to the guaranty, the manufacturer may claim credit or refund of such portion of the tax originally paid in respect of the article as is proportionate to the part of the price refunded to his vendee.

Where any taxable article is returned to the manufacturer thereof by his vendee for adjustment, replacement, or exchange, under a guaranty as to quality or service, and a new article given pursuant to the guaranty, free, or at a reduced price, the tax shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article.

APPENDIX B

# IN THE UNITED STATES COURT OF CLAIMS

No. 55-56

(Decided July 16, 1958)

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION,

*v.*

THE UNITED STATES

## OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This is the latest in the succession of suits brought by this plaintiff to recover excise taxes exacted from it by the Government in connection with the plaintiff's manufacture and sale of electric refrigerators. The first of the cases is reported in 128 C. Cls. at page 465. In that opinion, which was on the merits, the plaintiff's five year warranty of the refrigerating unit in its refrigerators, the so-called "Five Year Protection Plan", is described in detail and its history is recited. The court held that the actual expense of the plaintiff's repair and replacement of these units in satisfaction of its warranty was an "allowance" within the meaning of section 3443(a)(2) of the Internal Revenue Code of 1939, and that the plaintiff could recover on that basis. Two judges, dissenting in part, would have held that the five dollar charge made by the plaintiff for the five year warranty was not a part of the price of the refrigerator and was therefore entirely exempt from the excise tax.

In the plaintiff's second case, No. 49428, decided on the merits November 7, 1956, the court's decision was the same as in the first. Chief Judge Jones and Judge Laramore concurred, but with the express statement that "recovery in such cases is and should be limited to the cost incident to a protective plan that goes beyond the customary guarantee or service applicable in the trade generally."

In the instant case the court has made a finding that the five year warranty of refrigerating units has been customary in the trade generally during the years involved in all of the plaintiff's suits. It thus becomes evident that the concurrence of Chief Judge Jones and Judge Laramore in the second case resulted from matters regarded by them as vital to the decision but about which no facts appeared of record in either the first or second case.

It will be remembered that the original *General Motors* case, decided in 1954, had not directly raised the issue of the custom in the trade as to the five year warranty. The plaintiff's brief and the court's finding 17, in that case, referred only to the fact that the one year warranty had become standardized in the refrigeration industry. While the record did not show clearly that the extended warranty for the sealed units was not adopted by the trade, the clear implication of the few references in the record is to the effect that it was not the custom in the trade generally. Therefore, the issue in the present case and the issue in the first *General Motors* case are different, both factually and legally, a matter which we will discuss more fully below.

In the plaintiff's third case, No. 55-56, decided January 16, 1957, the plaintiff sought to press the court's previous decisions to what the plaintiff insisted was their logical conclusion. It urged that the cost of fulfilling its one year warranty of all parts of its refrig-

erators should be treated as an "allowance" under section 3443(a)(2). It also made the same contentions as to its five year warranty of its refrigerating units which it had made in the earlier cases. The court rejected the plaintiff's contention as to the one year warranty, and adopted the plaintiff's original contention as to the five year warranty of the refrigerating unit. It held that the five dollars charged for the five year warranty was not a part of the price of the refrigerator and hence was not subject to the excise tax. Judge Littleton, concurring in part and dissenting in part, would have adhered to the court's first decision based on the allowance theory, because he thought that the doctrine of collateral estoppel required that decision.

The writer of this opinion dissented, taking the position that the price paid for warranties in connection with sales of refrigerators was a taxable part of the purchase price, and that the cost of fulfilling the warranties was not an "allowance" within the meaning of section 3443(a)(2). The latter position was, of course, a departure from his earlier views.

The court in the plaintiff's third case referred the case to a trial commissioner of the court to take evidence only on the question of the reasonableness of the plaintiff's five dollar charge in relation to the actual cost of fulfilling the warranty. On June 12, 1957, the trial commissioner was also ordered to take evidence on the question of whether the five year warranty was customary in the trade during the years in question.

As stated above, the court has now made a finding of fact that the five year warranty in question is customary in the trade, and has been so almost from the time that the plaintiff introduced it. The fact which was not made to appear in the earlier cases, but which the Chief Judge and Judge Laramore regarded as vital, is now a fact of record. A majority of the court is therefore of the opinion that the plaintiff is not entitled to recover

because the price paid for these warranties was a taxable part of the purchase price of the article sold.

The instant case might appear to suggest a problem of collateral estoppel. The effect of the application of the doctrine would be to set the plaintiff apart from its competitors and from all other taxpayers similarly situated. Such a doctrine of "repose" would have to have a truly compelling reason behind it.

The Supreme Court of the United States in *Commissioner v. Sunnen*, 333 U.S. 591, makes plain its view that the doctrine of collateral estoppel is to be sparingly used in tax cases. The Court said, at page 601:

> And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they may be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue.

As we have stated above, the issue in the original *General Motors* decision and the issue presently before the court are different. The *Sunnen* case at page 599 makes it clear that the doctrine of collateral estoppel shall only be applied when the issues remain "static, factually and legally." That is not our case.

The writer of this opinion expressed his views on the collateral estoppel question in *Engineer's Club of Philadelphia v. United States*, 95 C. Cls. 42, which was cited with apparent approval in *Sunnen*, at page 601.

The plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*, and JONES, *Chief Judge*, concur.

LITTLETON, *Judge*, concurring:

On the occasion of the court's opinion in this case on January 16, 1957, I dissented from the holding that the charge made by the plaintiff for the contract to maintain the units after the expiration of the one year warranty was a separate charge in the nature of insurance and excludable from taxation as such under section 3441(a) of the Internal Revenue Code of 1939 so that plaintiff became entitled to recover taxes paid on the $5 charges collected from purchasers of such units. The ground of my dissent was that under the doctrine of collateral estoppel the court was bound by its decision rendered in *General Motors* v. *United States*, 128 C. Cls. 465, in which cross petitions for *certiorari* were denied by the Supreme Court on February 14, 1955, 348 U.S. 942. I was of the opinion that the doctrine of collateral estoppel was applicable because at that stage of the proceedings, i.e., on plaintiff's motion for summary judgment in the third *General Motors* case (No. 55-56), there appeared to be no change in the facts or issues from the first *General Motors* case. Upon remand to the trial commissioner of the court for hearing it was established as a fact that the extended warranty for more than one year had become a custom in the industry and was a custom in the industry during the period involved in the first *General Motors* case. This fact I believe to be most material although it was not raised nor was it a matter of record in the first or second *General Motors* cases, and I agree with Chief Judge Jones and Judge Laramore that it raises a new issue of great importance. Accordingly, since we now are faced with "points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time", I am of the opinion

that the parties are free to litigate such points in this proceeding and that the doctrine of collateral estoppel is no longer applicable. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598.

Reaching the merits, I concur in the majority's opinion thereon.

WHITAKER, *Judge*, dissenting:

In my opinion, the result now reached by the majority is inconsistent with the court's opinion delivered on January 16, 1957. In that opinion we held that the $5 charge made by plaintiff for an agreement to maintain the freezing units in its refrigerators for a period of four years, in addition to the customary one-year manufacturer's warranty, was not a part of the sales price.

The case was then referred to Commissioner Akers to take proof on two things; first, whether the charge for the agreement to keep the freezing unit in repair for four years, in addition to the usual one-year warranty, was reasonable; and, second, whether in the taxable years in question it had became the custom of the trade for the manufacturer to agree to keep the freezing unit in repair for five years.

On the first question he found the charges were reasonable, and on the second he found that this was the custom of the trade. It is this latter finding that has led astray at least some of my brethren.

Notwithstanding this finding, I still think the agreement to keep the freezing units in repair for four years, in addition to the usual one-year warranty, was no part of the sales price of the refrigerator, but was something the manufacturer agreed to give the purchaser, in addition to a refrigerator free of defects from workmanship and material.

The purchaser of an article from a manufacturer is entitled to no more than a warranty that the thing sold is free of defects in material and workmanship.

In the various trades the manufacturer is accustomed to fix a limited period within which such defects are supposed to appear, which varies with the article sold. In the case of electric refrigerators, the proof in the *General Motors* case clearly shows that the customary period from the time electric refrigerators were put on the market in 1920 until 1936 was one year. The proof also shows that if something went wrong with the freezing unit after the one-year warranty period, it had to be repaired at the customer's expense. Because such repairs were frequently unsatisfactory, the General Motors in 1933 offered to its customers an agreement to make necessary repairs after the one year period for a charge of $6 per year.

Two years later, in 1935, General Motors offered its customers an agreement to keep the freezing unit in repair for a period of four years. Under the 1933 agreement this would have cost the customer $24, but General Motors reduced its price for this to $10. The following year General Motors further reduced its price to $5, for the agreement to keep the machine in repair for four years after the expiration of the one-year warranty; but, while the former agreements were optional with the purchaser, the new plan, called the "Protection Plan", was obligatory.

But, even though the purchaser was required to take and pay for this "Protection Plan", there can be no doubt that it gave the purchaser something in addition to the obligation of the manufacturer to remedy defects in material and workmanship, which had to appear within the one-year warranty period, in order to hold the manufacturer liable to make them without expense to the customer.

General Motors, being perhaps the largest manufacturer of electrical refrigerators, set the pattern for the industry, and when General Motors put into effect its

"Protection Plan", agreeing to keep the machine in repair for four additional years, whether the defects occurred from wear and tear or from any other cause, other manufacturers felt obliged to follow its example. The result was that today all manufacturers of electric refrigerators sell their machines with the agreement to keep them in repair for a period of four years, in addition to the customary one-year warranty.

But, notwithstanding the fact that this has become the custom of the trade, it is nevertheless true that this "Protection Plan", under which the manufacturer agrees to keep the machine in repair for four years in addition to the usual one-year warranty, is an agreement over and above the obligation of the manufacturer to make repairs appearing within the usual one-year warranty period, that is, repairs necessitated by defects in material and workmanship.

The usual one-year warranty was given to discharge the manufacturer's obligation to sell a sound article, free from defects in material and workmanship. He could not make a charge therefor and claim that it was not a part of the sales price, because the sales price was for a sound machine—all as more fully explained in our prior opinion. But, the manufacturer could properly make a charge for a maintenance contract, beginning after the end of the warranty period, because this was a contract to make repairs not required under its warranty that the machine it had sold was free from defects.

I think this is a proper analysis of the transaction. If it is, the $5 charge is no part of the sales price of the refrigerator, and, thus, is not subject to the excise tax.

For this reason, I dissent.